IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1018 OF 2002
IN
APPEAL FROM ORDER NO.102 OF 1991

WITH
CIVIL APPLICATION NO.54 OF 2002
IN
APPEAL FROM ORDER NO.102 OF 1991

Mrs Bhanu Natwarlal Kotak ...Applicant
(In both the Applications)

Versus

Kanaiyalal Ratilal Ponda & Ors. ...Respondents
(In both the Applications)

Shri N.V.Gangal for the Applicant in both the Applications.
Shri K.S.Dewal for the Respondent Nos.1a to 1c.
Mrs Nalini V. Shah for the Respondent Nos.3 to 10.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 04, 2007.

P.C.:

1. Heard Advocates appearing for the parties. The Advocate for the Applicant states that the Respondent No.2a is dead and his heirs are brought on record.

2. The Applicant is the Appellant in Appeal From Order which was dismissed for default on 26th February, 1998. The case made out in the Application is that the name of Advocate who had filed vakalatnama on behalf of the Applicant on 10th August, 1993 was not shown on the cause list. It is stated that on 15th December, 2000 the Applicant filed an Application for bringing on record heirs of one of the Respondents. As the said

Application was filed in time and did not come on board, the Applicant made inquiries on 08th January, 2001 and was shocked to know that the matter was dismissed for default on 26th February, 1998. The Application for restoration is filed on 10th January, 2001 i.e within two days from the date of knowledge of the dismissal of the Appeal. The Civil Application No.1018 of 2002 is filed for condonation of delay in filing the Application for restoration. Civil Application NO.54 of 2002 is the Application for restoration of the Appeal. The main contention of the Applicant is that the appearance of her Advocate Shri M.B.Kotak was not shown on the cause list on the day on which the Appeal was dismissed.

3. The learned counsel appearing for the Respondent No.1a to 1c has vehemently opposed both the Applications. His submission is that the Civil Application for condonation of delay was belatedly filed on 23rd August, 2002. He placed reliance on a decision of this Court in the case of **Special Land Acquisition Officer (SIP) Vs. Jose Prazeres de Piedade Pinto r/o Old Market & Ors reported in 2006 (3) ALL MR Page 579**. He submitted that as there is no explanation whatsoever in the Application for condonation of delay for the delay in filing the said Application, the delay cannot be condoned and Appeal cannot be restored. He has invited my attention to the averments made in the

affidavit in reply filed by the Respondent No.1a.

4. It will be necessary to refer to the decision of the learned single Judge in the case of Special Land Acquisition Officer (supra). This was a case where an Appeal was belatedly filed beyond the period of limitation and the Appeal was not accompanied with an Application for condonation of delay. In paragraph Nos.6 and 7 of the said decision the learned single Judge has held thus:

> "6. The Order 41, Rule 3-A(1) of the Code of Civil Procedure, hereinafter called as "the C.P.C" provides that when an appeal is presented after the expirty of the period of olimitation sepcified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. Obviously, the Rule requires the appellant to file an application for condonation of delay alongwith the memo of the appeal which is presented in terms of Order 41, Rule 1 of the C.P.C. The sad Rule specifically uses the expression "accompanied by an application" in relation to an appeal presented after the expiry

of the period of limitation. The provisions of law, therefore, are absolutely clear that the application for condonation of delay in filing the appeal has necessarily to be filed along with the memo of the appeal and not thereafter.

7. Undoubtedly, the provision of law comprised under Order 41, Rule 3-A relates to the procedure and being so, even though at times for condonation of delay and such an application is filed subsequent to the filing of the appeal, that by itself would not be sufficient casue to reject such application. After all, the rules of procedure are made to enable the parties to assist the Court to arrive at a just decision on the controversy between the parties. Being so, merely because there is a delay of 51 days in filing the application for condonation of delay, that by itself cannot be a justification to dismiss the application for condonation of delay. However, while exercising such discretion it would be necessary to see whether the applicant has disclosed sufficient cause for not filing such application along with the appeal and whether the delay in the filing of such an application is for a sufficient cause".

5. It must be borne in mind that the learned single Judge has considered the controversy in the light of express provision of Rule 3-A(1) of Order XLI of the Code of Civil Procedure, 1908 which requires that an Appeal presented after expiry of period of limitation shall be accompanied by an Application supported by an affidavit setting forth the grounds for delay. It is in the face of the express provisions of the Code of Civil Procedure, 1908 that the learned Judge has taken a view that the Applicant/Appellant is required to explain the delay in filing Application for condonation of delay which normally ought to have been filed alongwith the memorandum of Appeal. In the present case, the Application is for restoration of an Appeal. There is no prohibition in law against incorporating a prayer for condonation of delay in the Application for restoration itself. Therefore, reliance placed by the learned counsel appearing for the Respondents on the aforesaid decision will not help him as it deals with an altogether different controversy. The present Application cannot be treated on par with an Application for condonation of delay in preferring an Appeal which is normally required to be filed alongwith memorandum of Appeal. Therefore, objection to tenability of the Application for condonation of delay deserves to be over-ruled.

6. The case made out in the Application is that when the Appeal was listed on the board, on the cause list, the name of the Advocate appearing for the Applicant was not shown. It is not the case of the contesting Respondents that on that day the name of the said advocate was shown on the cause list. The reply is only of denial. After dismissal of the appeal on 15th December, 2000, an Application for bringing on record heirs was filed which was accepted by the office. It is stated in the present Civil Application on oath that on 08th Jauary, 2001 an inquiry was made in the office when it was learnt that the Appeal was dismissed for default. The Application for restoration has been immediately filed on 10th January, 2001. There is nothing on record to discard the said version of the Applicant. A judicial notice can be taken of the fact that in many cases the names of the Advocates who have already filed vakalatnama are not shown on the cause list. A cause list of the Appellate Side of this Court runs into several pages. Therefore, it is very difficult for an Advocate to notice his matter if his name does not appear in the list. In my view, a case is made out for condonation of delay in applying for restoration and for the restoration of the Appeal which was dismissed for default. The Applicant has already deposited costs of Rs.5,000/- as stated in Application for condonation of delay.

7. It is made clear that if any interim relief was operating during the pendency of the Appeal, the same is not restored and the Appellant/Applicant will have to take out a fresh Application for interim relief.

8. Hence, I pass the following order:

(i) Delay in filing Civil Application No.54 of 2002 is condoned.

(ii) Appeal From Order No.102 of 1991 is restored to the file of this Court.

(iii) Interim relief, if any, operating during the pendecny of the Appeal is not restored with a liberty to the Applicant to take out an appropriate Application in that behalf.

(iv) If the Appeal is ready for hearing, office is directed to list the Appeal at bottom of the admission board on 30th April, 2007.

(v) The Respondent Nos.1a to 1c are permitted to withdraw the amount of costs deposited by the Applicant in this Court.

(vi) Civil Applications are disposed of in above terms.

JUDGE